RECORD AND BRIEF

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No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA,

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC.,

AND NEWEGG, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Dakota

BRIEF OF THE NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Wholesaler-Distributors (NAW) is a nonprofit trade association that serves as the national voice of wholesale distribution. NAW members consist of direct firm members engaged in the wholesale and distribution trades of every sort of nondurable and durable products, from candy to cranes, sold to businesses and consumers.

Wholesaler-distributors act as a critical link in the supply chain, linking manufacturers and suppliers of consumer and industrial products and services to retailers, resellers, dealers, contractors and other end user customers. The wholesale distribution channel provides valued marketing, sales, local inventory, transportation and fulfillment services that enable manufacturers to meet end user demand for timely product availability, installation, repair and maintenance. NAW is comprised of wholesaler-distributor enterprises of all sizes, as well as national, regional, state and local line-of-trade associations spanning the $5.6 trillion wholesale distribution industry.

The wholesale distribution industry employs an estimated 5 million men and women throughout the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certify that no counsel for any party authored this brief in whole or in part, and that no person other than *amicus curiae*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record for all parties received timely notice of the intention of *amicus* to file this brief. The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk.

United States. There are approximately 395,000 wholesaler-distributor enterprises with places of business in all 50 states and the District of Columbia.

This case is of interest, and importance, to NAW because the state sales taxation issue affects *wholesaler-distributors* – as well as retailers. In fact, any business that makes a sale at retail under the various state tax laws has a stake in the outcome of this case.

NAW member companies are victims of a state sales and use tax regime that effectively exempts remote internet sellers (i.e., sellers lacking a physical presence in the state) from the requirements imposed on local brick-and-mortar wholesaler-distributors to collect and remit locally-applicable sales tax. States cannot compel the collection and remittance of applicable sales tax on remote internet sellers as a result of decisions of this Court in *Nat'l. Bellas Hess v. Dep't of Rev. of Ill.*, 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). As a consequence, NAW member companies who have a distribution center, a sales office, a branch office, make deliveries in a state, or have some other form of physical presence in a state are forced to operate at a clear and substantial economic disadvantage vis-a-vis remote internet sellers competing in the same markets. This disadvantage results in lost sales revenue and hampers the ability of locally-present wholesaler-distributors to grow their businesses, invest in the community, and produce in-state employment opportunities.

SUMMARY OF ARGUMENT

Quill's detrimental effects on brick-and-mortar wholesaler-distributors, its basic unfairness, and its questionable Constitutional underpinning, provide ample cause to grant certiorari.

As Justice Gorsuch recognized, out-of-state internet sellers "don't seek comparable treatment to their in-state brick-and mortar rivals" when they dodge sales tax collection obligations; instead they use *Quill* as a weapon to "seek more favorable treatment, a competitive advantage, a sort of judicially sponsored arbitrage opportunity or 'tax shelter.'" *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1150 (10th Cir. 2016).

This "tax shelter" is substantial. According to The Tax Foundation, state sales tax rates in 2017 range from 2.9 percent to 7.25 percent of gross receipts. In addition, the local sales tax rates in the thirty-eight states that impose them range from .07 percent to 5.01 percent.[2]

The time has come, and this is the appropriate case, to answer Justice Kennedy's urging that the legal system "find an appropriate case for this Court to reexamine" the *Quill* holding. *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1135 (2015) (Kennedy, J., concurring).

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[2] https://taxfoundation.org/state-and-local-sales-tax-rates-in-2017/

ARGUMENT

QUILL UNFAIRLY HARMS BRICK-AND-MORTAR WHOLESALER-DISTRIBUTORS, NOT JUST RETAILERS

In its certiorari petition, South Dakota asserts the "unfairness [of *Quill*] to brick-and-mortar retailers is itself a reason to grant certiorari." (Petition, p. 15). The unfairness is not limited to retailers. Wholesaler-distributors and other resellers making taxable "sales at retail" under state tax laws[3] are also victims of the same unfairness as their retailer brethren.

Twenty-five years ago, this Court in *Quill* cemented a barrier constructed 25 years before that (in 1967 – before fax machines were commercially available) in *Bellas Hess*, that bars a state from requiring sellers to collect sales taxes on sales into the state unless the seller is "physically present" there. Despite the efforts over the years since by states to address this problem, made manifest to taxing jurisdictions suffering the collective loss of billions of dollars in revenues, this barrier, constructed and fortified in bygone economic and technological eras, remains in place today.

It is an understatement to say that the commercial landscape has evolved substantially over the quarter-century since this Court decided *Quill* and considerably more so in the 50 years that has elapsed since

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[3] In South Dakota, a "sale at retail" is defined as "any sale, lease, or rental for any purpose other than for resale, sublease, or subrent." S.D. Codified Laws §10-45-1(10).

Bellas Hess. Initially, commercial interest in state taxation of interstate sales was pretty well confined to the retail sector as mail-order businesses selling to consumers entered prominence. More recently, the internet has exploded as a platform for e-commerce in both the business-to-business (B2B) space where wholesaler-distributors are primarily engaged, in addition to business-to-consumer (B2C) markets. This market distinction blurs when the wholesaler-distributor makes a taxable sale at retail to a commercial, industrial, or institutional end-user (where the marketplace effects realized by wholesaler-distributors and retailers intersect).

According to the 2013 study of trends in the wholesale distribution industry conducted by the NAW Institute for Distribution Excellence (NAW Institute)[4] in cooperation with IBM, titled *Facing the Forces of Change: Reimagining Distribution in a Connected World,* in the same way that the shift toward e-commerce is "rapidly transforming the retail landscape ... e-commerce will now continue to transform wholesale distribution (p. 32) ... by 2017, a full 92% of distributors surveyed will offer e-commerce (p. 34) ... On average, online orders make up 9% of distributor revenues today, but that proportion is expected to surge to 21% by 2017, an increase of 130%. (p. 37)."

The competitive advantage enjoyed by remote internet sellers has and will continue to take an increasing and unfair toll on community-based brick-

[4] The NAW Institute for Distribution Excellence is the research and education arm of the National Association of Wholesaler-Distributors.

and-mortar wholesaler-distributors as e-commerce in B2B markets continues to grow, as has been forecasted. The 2016 NAW Institute/IBM report titled *Facing the Forces of Change: Navigating the Seas of Disruption* cites a report by Forrester Research, Inc., forecasting that U.S. B2B e-commerce would reach $1.3 trillion and account for 12% of all B2B sales by 2020.[5]

Justice Kennedy correctly noted that the 1992 *Quill* decision was "questionable even when decided." *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. at 1135. NAW submits *Quill* is inconsistent with *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). There is no logical basis why, under the U.S. Constitution, state sales tax collection needs a unique "nexus" standard that is different from the general nexus standard announced in *Complete Auto* applicable to state taxes on non-resident businesses. *Complete Auto* permits state taxes that are (1) "applied *to an activity* with a substantial nexus with the taxing State," (2) "fairly apportioned," (3) "not discrimina[tory]" and (4) "fairly related to the services provided by the State." *Id.* at 279 (emphasis added).

The nexus requirement in *Complete Auto* is basically an *economic* nexus. It does not turn on a company's physical presence in a State – it is the nexus between the taxed activity and the taxing State that is

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[5] Andy Hoar with Martin Gill, Susan Wu, Jacob Milender and Rachel Birrell, *B2B eCommerce: A Trillion Dollars for the Taking*, Forrester Research, Inc. (July 26, 2016). https://www.forrester.com/report/B2B+eCommerce+A+Trillion+Dollars+For+The+Taking/-/ERES82102?objectid=RES82102

constitutionally relevant, not the seller's "physical presence" in the State. The out-of-state seller's activity – making sales to customers in the State and benefiting from the State's market opportunity and protection of its laws – is taxed without discrimination versus in-state sellers. The *Quill* "physical presence" standard is not applied to any other state tax. The Court should retire this aberration.

At the time they were decided, no one could have foreseen the approaching economic evolution or the sweeping long-term effect of *Bellas Hess* and *Quill* on a technologically transformed 21st century economy. But that evolution, that transformation has occurred and will continue. The demands of the "physical presence" rule for the collection and remittance of state sales taxes articulated in *Bellas Hess* and *Quill* no longer fit marketplace realities. It should be discarded, and this case for which South Dakota seeks a Writ of Certiorari offers the Court the opportunity to do so.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

October 23, 2017

Respectfully submitted,

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